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IN THE

United States Supreme Court

ROBINSON WLADIMIR GONZÁLEZ-MESÍAS,
Petitioner,

v.

MICHAEL B. MUKASEY,
United States Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, a lawful permanent resident, was deported for a crime he committed 23 years ago. He sought a waiver of deportation under § 212(c) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(c) (repealed 1996). All the courts of appeals agree that equal protection demands that Petitioner be eligible for a waiver of deportation if a similarly situated alien would be eligible for a waiver of *exclusion*, had he left the country and returned. If Petitioner had been convicted of exactly the same crime under exactly the same circumstances, and subsequently left the country and returned, he would have been eligible for a waiver of exclusion. Should he, therefore, be eligible for a waiver of deportation, on the ground that it is irrational to treat him more harshly just because he never left the country?

PARTIES

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit is published at 529 F.3d 62 and is reproduced in the appendix ("App.") at App. 1-6. The decision of the Board of Immigration Appeals is unpublished and is reproduced in the appendix at App. 7-8. The decision of the Immigration Judge is unpublished and is reproduced in the appendix at App. 9-14.

JURISDICTION

The United States Court of Appeals for the First Circuit filed its opinion on June 18, 2008. Mr. González-Mesías sought and was granted an extension of time to file this petition until October 31, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves application of the Fifth Amendment to the United States Constitution, which is reproduced in relevant part in the Statutory Appendix at App. 15.

The statutory provisions at the center of this case are former § 212(c) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(c) (repealed 1996), as well as 8 U.S.C. § 1182(a)(2)(A), and 8 U.S.C. § 1227(a)(2)(A). These provisions are reproduced in the Statutory Appendix at App. 15-19.

Also, 8 C.F.R. § 1212.3(f)(5) is reproduced in the Statutory Appendix at App. 19.

STATEMENT OF THE CASE

Every year the Immigration and Naturalization Service ("INS") deports thousands of lawful permanent residents ("LPRs") like Petitioner Robinson Wladimir González-Mesías for offenses—often youthful and long-forgotten indiscretions—committed years, even decades, earlier. The only hope for many of these LPRs to remain in the United States is a waiver of removal under § 212(c) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1182(c). Although this provision was repealed in 1996, it continues to dictate the outcome of countless immigration cases. The provision's application to the common fact-pattern presented in this case has vexed the courts of appeals for years.

The circuits are hopelessly split. Whether or not an LPR in Mr. González-Mesías's position is deported depends on the accident of geography. Had Mr. González-Mesías lived in New York or anywhere else in the Second Circuit, he would be eligible for a waiver of deportation. Because he lived in Puerto Rico, he is not eligible for a waiver; the First Circuit, like five others, follows a rule that bars him from seeking a waiver no matter how compelling a case he can make.

The Struggles of the Executive and the Courts to Implement § 212(c) Relief

The confusion arises from the struggles of the Bureau of Immigration Appeals and the judiciary to implement § 212(c) relief in a manner that is

consistent with constitutional strictures—specifically, with the constitutional imperative not to draw irrational distinctions between similarly situated individuals. The challenge has been to ensure that an LPR who never left our country after he immigrated is not subjected to harsher treatment, by virtue of that constancy alone, as compared to an otherwise identical LPR who once left and came back.

The possibility of differential treatment arises because, under the INA, the Government can expel an alien from the United States on either of two sets of statutory grounds—grounds of deportation or grounds of exclusion (also referred to as grounds of "inadmissibility"). All aliens present in the United States may be subject to the statutory grounds for deportation. Only aliens who are seeking entry into the country for the first time, however, or who, after lawfully entering, have left the country and returned, may be subject to the statutory grounds for exclusion.

One basis on which the Government might move either to deport or exclude an LPR is if the LPR was convicted of a crime while in the United States. The list of offenses that serve as grounds for deportation is similar to the list of offenses that serve as grounds for exclusion, but the two lists are not identical. *Compare* 8 U.S.C. § 1227(a)(2) (enumerating 33 deportation grounds) *with* 8 U.S.C. § 1182(a)(2) (enumerating 46 grounds of exclusion).[1]

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[1] Under current law (and since 1996), immigration judges decide both deportability and excludability in "removal"

Even if an LPR is removable, the Attorney General has discretion under certain statutes to grant a waiver. Until 1996, the central provision governing waivers was § 212(c) of the INA. Even since Congress repealed § 212(c) in 1996, the provision has continued to play a significant role in many immigration proceedings. We describe the old regime first, and then explain the form in which § 212(c) persists after repeal.

Section 212(c) Waivers Before 1996. Section 212(c) granted the Attorney General discretion to waive exclusion, under certain circumstances, for "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. § 1182(c) (repealed 1996). Thus, § 212(c)'s explicit language only applied to exclusion proceedings and not to deportation proceedings. [2]

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proceedings, rather than strictly "deportation" proceedings or "exclusion" proceedings. *See* 8 U.S.C. § 1229a. The statutory grounds for deportation nonetheless remain separate from the statutory grounds for exclusion.

[2] In the deportation context, § 244 of the INA gave the Attorney General discretion to suspend the deportation of a person who (1) resided in the United States for at least 10 years straight after committing a deportable offense, and (2) possessed "good moral character," if (3) the deportation would "result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child." 8 U.S.C. § 1254(a)(2) (repealed 1996).

A literal reading of § 212(c) gave rise to an anomaly: If an LPR committed an offense constituting a basis for exclusion, left the country and upon reentry was put into exclusion proceedings, the LPR could seek a waiver of exclusion under § 212(c). If, however, that same LPR was allowed to reenter the country, but was subsequently put into deportation proceedings, § 212(c) relief would not be available. The availability of a waiver, in other words, depended upon the accident of whether the Government decided to exclude an alien at the border (in which case he could get a waiver) or let him enter and later decided to deport him (in which case he could not).

Over 50 years ago, the Bureau of Immigration Appeals ("BIA") resolved this anomaly by holding that a § 212(c) waiver would be available to an LPR in either circumstance. *See In re G-A-*, 7 I. & N. Dec. 274, 275-76 (B.I.A. 1956). Treating the two similarly situated classes of aliens differently, the BIA held, "would be clearly repugnant." *Id.* at 276. An LPR who committed an offense in the United States that would be a basis for exclusion, then departed and was permitted to return to the United States after commission of the offense, was thus eligible for a waiver even if he was subjected to deportation proceedings, rather than exclusion proceedings, after reentry. *Id.* at 275-76. Under this ruling, eligibility for a § 212(c) waiver in the deportation context still depended on whether the LPR had physically left and reentered the country after committing the relevant offense, but it no longer depended on the fortuity of whether the Government chose to institute exclusion or deportation proceedings.

While this BIA ruling resolved one anomaly, it gave rise to another: An LPR who had left the country and reentered could get a § 212(c) waiver of deportation, whereas an LPR who was otherwise identically situated, but had never left the country, could not. A pair of twins could immigrate to the United States together, acquire LPR status together, commit a youthful crime together, and face removal from the country together decades later, but still be treated differently. One of the twins could be treated more harshly simply because he never left the United States once he immigrated, while his brother gets preferential treatment merely because he left the country for a few days and returned.

The courts interceded to resolve this anomaly. More than 30 years ago, the Second Circuit held that if a § 212(c) waiver is available to an LPR who departs and reenters the country and later ends up in deportation proceedings, it should be available to an LPR who has never left the country. *See Francis v. INS*, 532 F.2d 268 (2d Cir. 1976). The court ruled that any distinction between those two groups of LPRs in regard to the availability of a § 212(c) waiver violated equal protection, because there was no rational basis for such a distinction. *Id.* at 269. The BIA almost immediately acquiesced in the Second Circuit's decision, declaring that it would treat similarly situated aliens equally with respect to their applications for § 212(c) relief, without regard for whether they had left the country after their offense. *In re Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976).

The Second Circuit's decision in *Francis* and the BIA's subsequent decision in *Silva*, however, did not

mean that all aliens in deportation proceedings were eligible for § 212(c) relief. Rather, a waiver was available to a deportable LPR who had never left the country, only if a waiver would have been available to a "similarly situated" excludable LPR who had left the country and returned. Because the grounds for deportation and exclusion are set forth in separate statutes with different lists of offenses, however, a conviction that would render an alien deportable would not necessarily render the same alien excludable, and vice versa. So the key question became: How does one determine whether a deportable LPR is "similarly situated" to an excludable LPR?

The BIA adopted a test that has come to be known as the "statutory counterpart" test, which focuses on the statutory language defining the basis of expulsion. *See, e.g., In re Wadud*, 19 I. & N. Dec. 182, 185-86 (B.I.A. 1984). Specifically, an LPR facing deportation was similarly situated to one facing exclusion only if the *statutorily defined* ground of deportation charged by the government was also a *statutorily defined* ground of exclusion. *See, e.g., id.* The INS eventually codified the BIA's statutory counterpart rule. *See* 8 C.F.R. § 1212.3(f)(5) (published on Sept. 28, 2004). Under this rule, an LPR is ineligible for a § 212(c) waiver if "[t]he alien is deportable under former § 241 of the Act or removable under § 237 of the Act on a ground which does not have a statutory counterpart in § 212 of the Act." *Id.*; *see also In re Brieva*, 23 I. & N. Dec. 766, 772-73 (B.I.A. 2005) (applying this test to deny eligibility for § 212(c) relief); *In re Blake*, 23 I. & N. Dec. 722, 729 (B.I.A. 2005) (same). The focus is

exclusively on comparing the statutory language in the separate lists of grounds for exclusion and deportation.

Section 212(c) Waivers After 1996. In 1996, Congress amended the INA to withdraw the Attorney General's § 212(c) authority. *See* Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 110 Stat. 3009-546, 597 (1996). But § 212(c) continued to apply in some circumstances even from the statutory grave. In particular, this Court held that it was unfair to deprive an LPR of eligibility for a waiver of deportation under § 212(c) if he had pled guilty to an offense in reliance on the assumption that he could seek a waiver. *See INS v. St. Cyr*, 533 U.S. 289, 323-24 (2001). Accordingly, the Court held that the repeal of § 212(c) was not retroactive, and § 212(c) relief remained available "for aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *Id.* at 326.

The result was that an LPR who would have been eligible for a § 212(c) waiver before 1996 was still entitled to a waiver (at least if the basis for the exclusion or deportation proceeding was a guilty plea) despite the repeal.

In mandating this result, this Court recognized that agency and judicial rulings over the previous decades had extended § 212(c) relief beyond exclusion proceedings, to the deportation context, as well. *Id.* at 294-96. The Court also acknowledged that the extension of § 212(c) relief "has had great

practical importance, because deportable offenses have historically been defined broadly." *Id.* at 295. The Court noted, for example, that in 1988 Congress specified that an alien was deportable upon conviction for any "aggravated felony," thereby making "the class of aliens whose continued residence in this country has depended on their eligibility for § 212(c) relief . . . extremely large." *Id.* at 295-96. This Court did not, however, definitively address the circumstances under which § 212(c) relief would be available in the deportation context.

The Government Begins Deportation Proceedings Against Mr. González-Mesías

Against this regulatory backdrop arose the deportation proceedings against Mr. González-Mesías. Mr. González-Mesías is a native and citizen of Chile. A.R. 218.[3] He entered the United States 30 years ago, in November 1978, as a visitor under a B-2 visa. A.R. 373. Less than a year later, in September 1979, Mr. González-Mesías was granted LPR status. *Id.*

In 1985, pursuant to a plea bargain, Mr. González-Mesías entered an *Alford* plea (a no-contest plea) to one count of sodomy and pled guilty to aggravated sexual battery in a Virginia court. A.R. 252-53; *see North Carolina v. Alford*, 400 U.S. 25 (1970). Although the Virginia court sentenced Mr. González-Mesías to concurrent 10-year prison terms, the court suspended all but one month of the concurrent sentences. A.R. 248-50. Mr. González-

[3] "A.R." refers to the Administrative Record filed with the First Circuit.

Mesías was thus required to serve one month in jail. He has had no other brushes with the criminal justice system in his 30 years in this country.

For 20 years, the Government did nothing to change Mr. González-Mesías's immigration status. Suddenly, in 2005, the U.S. Immigration and Customs Enforcement Department ("ICE") decided it was time to expel him on the basis of those ancient convictions. Because Mr. González-Mesías has never left the United States since his immigration, ICE's only option was to place him in deportation proceedings. According to ICE, Mr. González-Mesías's guilty pleas subjected him to deportation on two statutory grounds: (1) for violating a law relating to "sexual abuse of a minor" and (2) for committing a "crime of violence . . . for which the term of imprisonment . . . is at least one year." A.R. 70-71.; *see also* 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *id.* § 1101(a)(43)(A) (defining "sexual abuse of a minor" as an "aggravated felony"); *id.* § 1101(a)(43)(F) (defining a "crime of violence . . . for which the term of imprisonment is at least one year" as an "aggravated felony").

Mr. González-Mesías applied for a waiver pursuant to § 212(c). A.R. 178-79. *If* such relief was permissible, Mr. González-Mesías was a strong candidate. The criteria for granting § 212(c) relief include:

> family ties within the United States, residence of long duration in this country (particularly when the inception of residence

> occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).

In re Marin, 16 I. & N. Dec. 581, 584-85 (B.I.A. 1978). Mr. González-Mesías has lived in the United States for all of his adult life, since his immigration in 1978 at the age of 18. A.R. 373. He has been married to a United States citizen for over 14 years, except for a brief six month period when they divorced and remarried each other. A.R. 58-65. While in the United States, he maintained an excellent employment record and owned his own business. A.R. 279-80. Since his 1985 transgressions, Mr. González-Mesías's record has been completely clean. A.R. 66-67.

But all this begs the key question: whether Mr. González-Mesías was eligible for a waiver. That inquiry turns on whether he would have been eligible for a waiver of deportation before 1996, which, in turn, depends upon whether he was similarly situated to an LPR who would have been entitled to a waiver from *exclusion*.

Intervening BIA Authority Undermines the Bid for a Waiver, But Is Overturned

While the deportation proceedings were pending against Mr. González-Mesías, the BIA issued two rulings that undermined his bid for § 212(c) relief: *In re Brieva*, 23 I. & N. Dec. 766 (B.I.A. 2005); and *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005).

Blake involved an alien who was deportable due to a conviction for sexual abuse of a minor. In keeping with its statutory counterpart rule, the BIA held that whether an alien was similarly situated to aliens in exclusion proceedings turned upon "whether Congress has employed *similar language* to describe substantially equivalent categories of offenses." 23 I. & N. Dec. at 728 (emphasis added). The inquiry did not turn upon whether the alien's actual conduct would have fallen within a ground for exclusion.

In the case of the alien in *Blake*, the basis for his deportation was that his sexual abuse offense constituted an "aggravated felony." *Id.* at 722; 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."). If he had been in exclusion proceedings, the basis for his exclusion could have been that the same offense was a crime of "moral turpitude." 8 U.S.C. § 1182(a)(2)(A)(i)(I) (providing, with exceptions not relevant here, that "any alien convicted of . . . a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible"). Under the statutory counterpart rule, the BIA held, the alien was not similarly

situated to an excludable alien who would have been eligible for waiver from exclusion. "[T]he moral turpitude ground of exclusion," the BIA held, "addresses a . . . much broader category of offenses than the aggravated felony sexual abuse of a minor charge." 23 I. & N. Dec. at 728. Accordingly, the BIA held that the LPR was ineligible for a § 212(c) waiver. *Id.* at 729.

The BIA reached the same result under comparable facts in *Brieva*. That case involved an alien who was deportable due to a conviction for "'unauthorized use of a motor vehicle.'" 23 I. & N. Dec. at 767 (citation omitted). That offense made the LPR deportable because it constituted a "crime of violence." 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *id.* § 1101(a)(43)(F) (defining a "crime of violence . . . for which the term of imprisonment is at least one year" as an "aggravated felony"). If he had ever left the country, he could have been excludable on the ground that he had committed a crime of "moral turpitude," *id.* § 1182(a)(2)(A)(i)(I), and he would have been eligible for a waiver of exclusion. But the BIA held that he was not eligible for a waiver of deportation. It reasoned: "Although there need not be perfect symmetry in order to find that a ground of removal has a statutory counterpart in section 212(a), there must be a closer match than that exhibited by the incidental overlap between section 101(a)(43)(F) (crime of violence) and section 212(a)(2)(A)(i)(I) (crime involving moral turpitude)." 23 I. & N. Dec. at 773.

Bound by the BIA's decisions in *Blake* and *Brieva*, the Immigration Judge ("IJ") denied Mr. González-Mesías's application for a § 212(c) waiver. App. 13. Relying on *Brieva* and *Blake*, she reasoned:

> [T]he respondent is barred from receiving relief under Section 212(c) because the [BIA] has specifically stated that a crime of sexual abuse of a minor . . . places him in a position that he would be ineligible for relief under Section 212(c) inasmuch as there's no comparable ground between his deportation ground and an inadmissibility ground.
>
> * * *
>
> The Court has made a determination that both [of Mr. González-Mesías's] crimes involve violence, and as such, the Court made a finding that he was also deportable because he was an aggravated felon because he had committed a crime of violence to which he was sentenced for 10 years. Therefore, under *Matter of Brieva* this respondent is definitely barred from filing relief under former Section 212(c) inasmuch as there's no comparable ground for a crime of violence under Section 212(c).

App. 12-13.

But then, after the IJ issued this ruling, the Second Circuit reversed the BIA's ruling in *Blake*. *See Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007). It held that the statutory counterpart rule that the BIA had been applying still yielded irrational distinctions

based upon whether or not the LPR had ever left the country. *Id.* at 104.

The BIA and First Circuit Affirm

On appeal of the IJ's determination in his case, Mr. González-Mesías urged the BIA to overrule its rulings in *Brieva* and *Blake*, in light of the Second Circuit's reversal of *Blake*. App. 4. The BIA dismissed Mr. González-Mesías's appeal, declining to revisit *Blake* and *Brieva*. App. 8. The BIA reasoned:

> We recognize that the United States Court of Appeals for the Second Circuit disagrees with the Board's analysis in *Matter of Blake*, but we decline to follow the Second Circuit's holding in cases arising outside of that Circuit. *See Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007). Accordingly, the appeal is dismissed.

App. 8.

Mr. González-Mesías appealed the BIA's decision to the First Circuit. He urged the First Circuit to adopt the Second Circuit's rationale in *Blake* and reject the statutory counterpart test. App. 5. The First Circuit, however, followed its recent precedent upholding the statutory counterpart test. App. 6 (citing *Dalombo Fontes v. Gonzales*, 483 F.3d 115 (1st Cir. 2007), and *Kim v. Gonzales*, 468 F.3d 58 (1st Cir. 2006)). In doing so, the First Circuit recognized that its decision was in direct conflict with the Second Circuit's decision in *Blake*. App. 5.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT OVER WHETHER THE STATUTORY COUNTERPART TEST FOR § 212(C) RELIEF VIOLATES EQUAL PROTECTION.

This case presents an inter-circuit conflict over whether the application of the statutory counterpart test violates equal protection. Today seven circuits have addressed the question in published opinions. The Second Circuit has concluded that the BIA's application of the statutory counterpart test violates equal protection by failing to treat similarly situated aliens equally. Five circuits, including the First Circuit in this case, have concluded to the contrary that the statutory counterpart test does not violate equal protection. A split Ninth Circuit panel has agreed with the majority rule, but the court will be addressing this issue en banc.

A. The Second Circuit Has Concluded That the Statutory Counterpart Test for § 212(c) Relief Violates Equal Protection.

In *Blake v. Carbone*, the Second Circuit acknowledged that the LPR before it would not be eligible for a waiver under the statutory counterpart test: "An aggravated felony need not be a crime involving moral turpitude. A crime involving moral turpitude similarly need not be an aggravated felony." *Id.* at 102. Nevertheless, the court held that the LPR was eligible for a waiver because the statutory counterpart test did not sufficiently safeguard the right to equal protection. *Id.* at 103.

The Second Circuit reasoned that the statutory counterpart test's emphasis on finding similar language in the lists of offenses in 8 U.S.C. § 1182 and 8 U.S.C. § 1227 missed the point of the equal protection analysis. *Id.* at 102. The point of the equal protection analysis is that LPRs must receive similar access to § 212(c) relief regardless of whether they were in deportation proceedings or exclusion proceedings—specifically, regardless of whether or not they left the country for a brief trip. *Id.* (citing *Francis*, 532 F.2d at 273). The equal protection analysis did not turn on the particular language Congress chose to describe categories of crimes, the court held. *Id.*[4]

Instead, the court held, the focus must be on the offense the LPR committed—*i.e.*, on his actual conduct. *Id.* Specifically, "petitioners' eligibility for

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[4] The court in *Blake* also noted that the BIA's interpretation of § 212(c) was not entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 489 F.3d at 100. Under *Chevron*, the court's first step is to determine whether the statutory language is clear. If it is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. If, however, the language is not clear, then the court should defer to an agency's interpretation of a statute if the agency has provided a reasonable interpretation. *Id.* In *Blake*, the Second Circuit concluded that § 212(c) was never intended to apply to LPRs in deportation proceedings, so there was no ambiguity in the statutory language. 489 F.3d at 100. Because § 212(c) relief had been extended to deportation proceedings as a result of constitutional necessity—not the result of statutory interpretation—the court found no basis to defer to the BIA's interpretation. *Id.*

a § 212(c) waiver must turn on their particular criminal offenses. If the offense that renders a [LPR] deportable would render a similarly situated [LPR] excludable, the deportable [LPR] is eligible for a waiver of deportation." *Id.*

In holding that the statutory counterpart test was unconstitutional, the Second Circuit recognized that it was parting ways with other circuits. *See id.* at 103. (citing as contrary authority, *Caroleo v. Gonzales*, 476 F.3d 158, 168 (3d Cir. 2007); *Kim*, 468 F.3d at 62, *Vo v. Gonzales*, 482 F.3d 363 (5th Cir. 2007); *Sanchez v. Gonzales*, 473 F.3d 133 (5th Cir. 2006); and *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994)). Nonetheless, the *Blake* court observed that it was "bound by *Francis's* mandate to ensure that '[LPRs] who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.'" *Id.* at 104 (quoting *Francis*, 532 F.2d at 273).

B. The Ninth Circuit Initially Concluded That the Statutory Counterpart Test Did Not Violate Equal Protection, But Has Taken the Issue Up for Rehearing En Banc.

Although the Ninth Circuit initially concluded that the statutory counterpart test did not violate equal protection, the court has decided to hear this issue en banc. Two decisions are relevant to understanding the Ninth Circuit's current analysis of this issue.

In *Komarenko*, the petitioner conceded removability because he was convicted of a "firearms charge" under 8 U.S.C. § 1251(a)(2)(C) (deportation

provisions subsequently amended and transferred to § 1227(a)(2)(C)), but he sought a waiver under § 212(c) because his offense could also constitute a ground of exclusion as a "crime involving moral turpitude" under 8 U.S.C. § 1182(a)(2)(A)(i)(I). *See* 35 F.3d at 434-35. The Ninth Circuit rejected this argument, stating that "when courts have found an equal protection violation, the excludability and deportation provisions have been substantially identical," while "[i]n the instant case, the provisions are entirely dissimilar, and the distinction between the two classes is not arbitrary or unreasonable." 35 F.3d at 435. The court concluded by stating that "the linchpin of the equal protection analysis in this context is that the two provisions be substantially identical." *Id.* (internal quotation omitted). Thus, under *Komarenko*, the BIA's statutory counterpart test passed constitutional muster.

In *Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007), the Ninth Circuit reaffirmed its holding in *Komarenko* that the deportation and exclusion provisions must be substantially identical. *See id.* at 1104-05. The Court interpreted the equal protection analysis in *Francis* to require only "that the government give the same benefit (the waiver of a particular ground of inadmissibility) to aliens whether or not they depart the United States. *Komarenko* establishes that 'the linchpin of the equal protection analysis in this context is that the [deportation and exclusion] provisions be substantially identical.'" *Id.* at 1105 (quoting *Komarenko*, 35 F.3d at 435).

In a concurring opinion, Judge Berzon wrote separately to explain that she "would decide this

case differently than does the majority" if the panel was "not constrained by *Komarenko*." 493 F.3d at 1106. In Judge Berzon's view "*Komarenko* . . . was wrongly decided, in large part for the reasons that the Second Circuit recently explained in a thorough analysis of the equal protection issue underlying this case." *Id.* Judge Berzon agreed with the Second Circuit's focus on the crime committed, and advocated rejecting the approach of focusing on statutory language. In Judge Berzon's view, "we should simply ask whether a deportable alien would also have been excludable for the *offense* that rendered him deportable, regardless of the statutory *ground* under which that offense falls." *Id.*

Judge Berzon stated an additional reason for reconsidering the Ninth Circuit's decision in *Komarenko* and joining the Second Circuit's decision in *Blake*:

> Although the Supreme Court has not directly addressed the issue in this case, it has assumed a premise consistent only with the offense-specific approach of the Second Circuit. *INS v. St. Cyr*, 533 U.S. 289 (2001), observed that "[t]he extension of § 212(c) relief to the deportation context has had great practical importance, because deportable offenses have historically been defined broadly." *Id.* at 295. As an example of the crimes that could be waived under § 212(c), the Court cited a particularly large and growing category of deportable offenses: aggravated felonies. *Id.* at 295 & n.4. Yet, it is precisely this category of offenses that

> *Matter of Blake* and *Komarenko* are most likely to render unwaivable.

Id. at 1109-10.

On January 25, 2008, a majority of the active judges on the Ninth Circuit decided to take the case for rehearing en banc. *See Abebe v. Mukasey*, 514 F.3d 909 (9th Cir. 2008). The case was argued and submitted to the en banc Ninth Circuit on March 25, 2008. No opinion has yet been issued.

C. The First, Third, Fifth, Seventh, and Eighth Circuits Have Concluded That the Statutory Counterpart Test for § 212(c) Relief Does Not Violate Equal Protection.

Five other circuits have held in published opinions that the statutory counterpart test for § 212(c) relief does not violate equal protection. The circuits that have so held are the First, Third, Fifth, Seventh, and Eighth circuits.[5]

The Seventh Circuit was the first to address the constitutionality of the statutory counterpart test after the BIA's decisions in *Blake* and *Brieva*. *See*

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[5] In an unpublished opinion, the Tenth Circuit has also concluded that the statutory counterpart test for § 212(c) relief does not violate equal protection. *See Alvarez v. Mukasey*, No. 07-9528, 2008 U.S. App. LEXIS 13441, at *13-14 (10th Cir. June 24, 2008). In an unpublished opinion, the Eleventh Circuit remanded to the BIA rather than deciding the issue. *See Palomino-Abad v. United States*, 229 Fed. Appx. 891, 892 (11th Cir. 2007). The Fourth, Sixth, and D.C. Circuits have not reached the issue.

Valere v. Gonzales, 473 F.3d 757 (7th Cir. 2007). The court stated that "the requirement of a comparable ground of exclusion in § 212(a)—a 'statutory counterpart'—is what makes a removable, nondeparting alien similarly situated to an inadmissible alien in the first place." *Id.* at 762. However, the Seventh Circuit then promptly confused the issue by stating: "If the removable alien's *crime of conviction* is not substantially equivalent *to a ground of inadmissibility* under § 212(a), then the removable alien *is not similarly situated* for purposes of claiming an equal protection right to apply for § 212(c) relief." *Id.* at 762 (emphasis added). Of course, this language suggests that the Second Circuit's offense-based approach is the only approach that would satisfy equal protection.

Despite the confusion in its analysis in *Valere*, the Seventh Circuit has since unequivocally rejected the Second Circuit's approach in *Blake*. In *Zamora-Mallari v. Mukasey*, 514 F.3d 679 (7th Cir. 2008), decided after the Second Circuit's decision in *Blake*, the Seventh Circuit reaffirmed its holding in *Valere*, noted that the Ninth Circuit's reasoning in *Komarenko* was "particularly persuasive," and rejected the Second Circuit's analysis in *Blake* as in "conflict[] with every other circuit that has confronted the issue." *Id.* at 691-92.

The Third Circuit has reached the same conclusion, with a more straightforward analysis, drawing on the Ninth Circuit's decision in *Komarenko*:

> As *Komarenko, Brieva,* and *Blake* make clear, the underlying crime for which Caroleo was convicted plays no role in this inquiry. It is therefore irrelevant that Careoleo's conviction for attempted murder could have subjected him to removal as an alien convicted of a crime of moral turpitude under INA § 237(a)(2)(A)(i). Once the government has categorized his offense as a "crime of violence" in removal proceedings, and that categorization has been upheld, our § 212(c) inquiry focuses on whether *this statutory ground* for removal is substantially equivalent to any of the statutory grounds for exclusion contained in INA § 212(a).

Caroleo, 476 F.3d at 168 (internal citation omitted).

The Fifth Circuit has followed suit in equally emphatic language, noting that "[e]ven if deportable and excludable aliens can be considered similarly situated, there is a rational basis for distinguishing between the two" because "'Congress's more lenient treatment of excludable as distinct from deportable aliens . . . creates an incentive for deportable aliens to leave the country.'" *Vo*, 482 F.3d at 371 (citation omitted). The court added that "Congress chose to make certain excludable aliens eligible for discretionary relief under § 212(c), and the expansion of that provision, required by *Francis* and *Silva*, has only been extended to those for whom the ground of deportability has a comparable ground of inadmissibility." *Id.* at 372.

In ruling the same way in this case, the First Circuit was building upon preexisting precedent that

reached the same conclusion. *See Dalombo Fontes*, 483 F.3d at 123. And then, in this case, as noted above, the First Circuit acknowledged its conflict with the Second Circuit's intervening in *Blake*, but steadfastly reaffirmed its own earlier holding. App. 5-6.

The Eighth Circuit, too, followed its sister circuits before the Second Circuit decided *Blake*. *See Soriano v. Gonzales*, 489 F.3d 909, 909-10 (8th Cir. 2006). Later, the Eighth Circuit acknowledged the conflict with *Blake*, but nevertheless reaffirmed its position and declined to follow the Second Circuit's lead. *See Vue v. Gonzales*, 496 F.3d 858, 860 (8th Cir. 2007) ("Vue's conviction of an aggravated felony—a crime of violence—made him deportable. Because this ground of deportation does not have a statutory counterpart in § 212(a), he cannot claim § 212(c) relief. This also defeats his equal protection claim.").

D. This Inter-Circuit Conflict Is Widely Recognized and Intractable.

In reaching its decision in *Blake*, the Second Circuit recognized that it was parting ways with other circuits:

> We recognize our holding is at odds with that reached by several other circuits. . . . We cannot follow the lead of the Ninth Circuit and the other courts that have considered the issue because we are bound by *Francis*'s mandate to ensure that "permanent residents who are in like circumstances, but for irrelevant and fortuitous factors, be

> treated in a like manner." Were we to approve of these other courts' formulaic approach—limiting ourselves only to the language in the relevant grounds of deportation and exclusion—we would be ignoring our precedent that requires us to examine the circumstances of the deportable alien, rather than the language Congress used to classify his or her status.

489 F.3d at 103-04 (internal citation omitted).

Court of appeals decisions since *Blake* have recognized the continuing circuit split. The Seventh Circuit recognized that "two circuits have rejected *Blake*'s approach in published opinions," *Zamora-Mallari*, 514 F.3d at 688, although the Ninth Circuit later vacated its decision in *Abebe* to allow the court to take the case en banc, 514 F.3d 909. The First Circuit in this case noted that its reasoning was consistent with the majority of the circuits, but "the Second Circuit's decision in *Blake v. Carbone* is at odds." App. 5. The First Circuit also noted that the BIA had "declined to overrule its decisions in *Brieva* and *Blake*, and while it recognized the Second Circuit's decision to the contrary, the BIA noted that it 'decline[d] to follow the Second Circuit's holding in cases arising outside of that Circuit.'" App. 4 (quoting App. 8).

In two of the circuits that have declined to follow *Blake*, panel members have issued concurring opinions advocating the Second Circuit's approach in the *Blake* decision, but recognizing that *Blake* was at odds with the controlling opinions in their circuits.

Abebe, 493 F.3d at 1106 (Berzon, J., concurring); *Vue*, 496 F.3d at 863 (Bye, J., concurring).

In short, the issue has fully percolated in the courts of appeals. Circuits on either side have considered, and rejected, the opposing arguments. The split is intractable and the courts are entrenched. Only this Court can break the impasse.

II. THE QUESTION PRESENTED INVOLVES A RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE.

Despite the unavailability of § 212(c) relief under current law, § 212(c) relief continues to be critically important to those LPRs whose criminal convictions pre-date its repeal. As this Court recognized in *St. Cyr*, the "extension of § 212(c) relief to the deportation context has had great practical importance." 533 U.S. at 295. In recognition of this importance, *St. Cyr* ensured that § 212(c) relief would remain available to aliens who pled guilty to a deportable crime before the enactment of IIRIRA.

In *St. Cyr*, this Court predicted that a large number of individuals would be affected by the Court's decision: "Since the 1996 statutes expanded the definition of 'aggravated felony' substantially—and retroactively—the number of individuals now subject to deportation absent § 212(c) relief is significantly higher than these figures would suggest." 533 U.S. at 296 n.6. Although there are no clear statistics revealing the bases of removal for LPRs, there is reason to believe that this Court was correct in its prediction that the number of removal orders issued for "aggravated felons" would increase.

According to the Transactional Records Access Clearinghouse ("TRAC"), which has conducted a comprehensive study of cases, an estimated 300,000 non-citizens have been ordered deported from the United States in the last decade and a half based on crimes categorized as "aggravated felonies."[6] The number of removal orders issued for "aggravated felons" has been increasing progressively each year. *See* TRAC New Data.

Although *St. Cyr* predicted that the preservation of § 212(c) relief would be important for this increasing number of individuals subject to deportation because they have been convicted of an "aggravated felony," the statutory counterpart test virtually guarantees that aliens who have committed crimes classified by the BIA as aggravated felonies will be ineligible for § 212(c) relief.

> Aggravated felonies will most often fail the comparable grounds test. Although the category includes numerous crimes for which an arriving alien could be excluded, the term "aggravated felony" never appears as a ground for exclusion. Furthermore, the

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[6] *See* TRAC, "New Data on the Processing of Aggravated Felonies (Jan. 5, 2007)," available at http://trac.syr.edu/immigration/reports/175/ (last viewed on Aug. 18. 2008) ("TRAC New Data"). Additionally, 87,844 lawful permanent residents were deported for criminal convictions between April 1, 1997 and August 1, 2007, according to Immigration and Customs Enforcement statistics obtained through a Freedom of Information Act request by Human Rights Watch, and to be published in a forthcoming report by that organization.

> category of aggravated felonies, as well as the subcategories enumerated in the statute, *see* 8 U.S.C. § 1101(a)(43), imprecisely overlap with the most similar category of excludable offenses: crimes involving moral turpitude.

Abebe, 493 F.3d at 1110 (Berzon, J., concurring).

The issue of statutory eligibility becomes more important for LPRs as the years go by because the individuals who would seek § 212(c) relief become more likely to merit waiver. Some individuals in removal proceedings because they have applied to renew an expiring alien residence card or are seeking to apply for citizenship may have old convictions. Individuals with old convictions (often minor), subsequent rehabilitation, and otherwise good records of moral character would be strong candidates for § 212(c) relief if they were not otherwise ineligible. This Court also recognized that "[i]n addition, the nature of the changes [to the grounds of deportation] (bringing under the definition more minor crimes which may have been committed many years ago) suggests that an increased percentage of applicants will meet the stated criteria for § 212(c) relief." *St. Cyr*, 533 U.S. at 296 n.6.

Moreover, the BIA's statutory counterpart test creates an incentive for manipulation of the deportation proceedings to prevent petitioners who may otherwise be eligible for a § 212(c) waiver from obtaining relief. Because the statutory counterpart test turns on the ground of deportation on which the Government elects to proceed (because the language

of that ground is then compared to the list of grounds for exclusion to determine whether it is sufficiently similar), the Government can choose to categorize an offense in such a way as to foreclose the LPR's ability to seek relief under § 212(c). Many criminal offenses could be classified within a number of different categories. *See generally* 8 U.S.C. § 1182; *id.* § 1227. Because the decision on which ground to proceed is solely within the control of the Government, the choice of how to categorize an offense determines whether that offense will pass or fail the statutory counterpart test. For example, crimes of moral turpitude render an alien both deportable and excludable. *See id.* § 1182(a)(2)(A)(i)(I) (listing crimes of moral turpitude as a basis for exclusion); *id.* § 1227(a)(2)(A)(i)(I) (listing crimes of moral turpitude as a basis for deportation). However, the Government can choose to categorize offenses that would also constitute crimes of moral turpitude under alternative grounds of deportation, which then ensures that an LPR cannot seek § 212(c) relief under the BIA's statutory counterpart test. Indeed, this appears to be exactly what happened to Mr. González-Mesías and the petitioner in *Blake*.[7]

The importance of this circuit split is heightened by the fact that a large percentage of the federal courts' immigration docket falls in the Second and

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[7] App. 12 (Government chose to proceed on sexual abuse of a minor ground rather than categorizing offense as a crime of moral turpitude, which has a statutory counterpart in the grounds of exclusion); *Blake*, 23 I. & N. Dec. at 728 (same).

Ninth Circuits, two circuits that currently have taken contrary positions on this issue. *Compare Komarenko*, 35 F.3d at 435, *with Blake*, 489 F.3d at 104. The Second and Ninth Circuits review the vast majority of appeals challenging decisions of the BIA. In 2007, the federal courts reviewed 9,123 appeals of BIA decisions. Administrative Office of the United States Courts, *2007 Annual Report of the Director: Judicial Business of the United States Courts* at Table B-3 (2008). Of this number, the Second Circuit reviewed 2,177 appeals, 24% of the total appeals. The Ninth Circuit reviewed 4,280 appeals, constituting almost half of all the total appeals.[8]

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[8] The Administrative Office of the United States Courts keeps detailed statistics concerning the caseload of the federal courts. For the years 2003 through 2007, the circuits handled the following number of appeals of BIA decisions:

	2003	2004	2005	2006	2007
DC Circuit	7	1	0	0	0
1st Circuit	140	140	222	219	214
2nd Circuit	2,081	2,632	2,550	2,640	2,177
3rd Circuit	471	518	690	748	602
4th Circuit	290	348	352	317	244
5th Circuit	393	483	593	644	467
6th Circuit	345	333	316	401	294
7th Circuit	234	255	257	202	172
8th Circuit	207	167	133	124	122
9th Circuit	4,206	5,368	6,583	5,862	4,280
10th Circuit	105	97	81	89	71
11th Circuit	354	470	572	665	480
Totals:	8,833	10,812	12,349	11,911	9,123

Id.

Combined, the Second and Ninth Circuit receive an overwhelming 71% of the petitions for review challenging decisions of the BIA. A split between these two circuits alone would have a considerable impact on the ability of the BIA to apply the INA consistently across the country. On the other hand, as demonstrated above, the few circuits that have not yet reached the question presented here decide relatively few immigration appeals each year. *See id.*

There is an urgent need for this Court to resolve this circuit split. Allowing this split to continue will result in differential treatment of LPRs based solely on what circuit will review their cases. Permitting this split to continue will undermine the "scheme of national regulation" established by the INA. *See generally Plyler v. Doe*, 457 U.S. 202, 208 n.5 (1982) (acknowledging that INA represents the federal government's "scheme of national regulation").

The certainty of differential treatment is aptly illustrated by this case. The First Circuit, following the Ninth Circuit, found Mr. González-Mesías ineligible for § 212(c) relief because the ground of deportability with which he was charged—the aggravated felony ground of deportation for aliens who have been convicted of "sexual abuse"—had no identical ground of exclusion. App. 5-6. If Mr. González-Mesías had been detained within the jurisdiction of the Second Circuit rather than the First Circuit, the question would have been whether the *offense* that he committed would constitute a ground of exclusion. In this case, Mr. González-Mesías could have—and almost certainly would have—been able to show that his offense qualified

under INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), as a crime involving moral turpitude. In the Second Circuit, then, Mr. González-Mesías would have been eligible to seek a waiver under § 212(c).

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROBINSON WLADIMIR GONZÁLEZ-MESÍAS,
Petitioner,

v.

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL
Respondent.

No. 07-2346

OPINION

Petitioned for Review from the Board of Immigration Appeals
File: A22 230 921- San Juan, PR—
Sandra Lea Lynch, C.J., Presiding

Argued: June 5, 2008

Decided and Filed: June 18, 2008

Before TORRUELLA, and LIPEZ,
Circuit Judges.

COUNSEL

Patrick D. O'Neill, Jason P. Ramos, and O'Neill & Gilmore, P.S.C., for Petitioner.

Corey L. Farrell, Attorney, Jeffrey S. Bucholtz, Acting Assistant Attorney General, and Terri J. Scadron, Assistant Director, U.S. Department of Justice, for Respondent.

OPINION

SANDRA LEA LYNCH, Circuit Judge.

Robinson González–Mesías, a native and citizen of Chile, petitions for review of an August 2, 2007 decision by the Board of Immigration Appeals ("BIA") finding him ineligible for a waiver of deportability, under section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c) (repealed in 1996 but applicable to petitioner). We deny the petition on the basis of our prior circuit precedent, which rejects the Second Circuit's rule in *Blake v. Carbone,* 489 F.3d 88 (2d Cir. 2007). *See Dalombo Fontes v. Gonzales,* 483 F.3d 115 (1st Cir.2007); *Kim v. Gonzales,* 468 F.3d 58 (1st Cir.2006).

I.

González–Mesías entered the United States in 1978 on a tourist visa, and a year later, he became a lawful permanent resident. In 1985, González–Mesías pled guilty in Virginia state court to two felonies: one count of aggravated sexual battery, Va.Code § 18.2–67.3, and one count of sodomy, *id.* §

18.2–67.1. He was sentenced to ten years' imprisonment on each charge with the sentences to run concurrently. The court suspended nine years and 335 days of each sentence.

In January 2005, Immigration and Customs Enforcement initiated removal proceedings against González–Mesías. The agency charged González–Mesías with removability, pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony. The first charge was based on his 1985 conviction for aggravated sexual battery, tying it to the definition of aggravated felony in 8 U.S.C. § 1101(a)(43)(A) ("murder, rape, or sexual abuse of a minor"). The second charge was based on the 1985 sodomy conviction and was tied to 8 U.S.C. § 1101(a)(43)(F) ("a crime of violence... for which the term of imprisonment [was] at least one year").[1]

González–Mesías conceded his removability to the Immigration Judge ("IJ") as to the first charge, but challenged the second charge, arguing that his sodomy conviction was not for a "crime of violence." The IJ found that González–Mesías was deportable on both grounds, and denied the petitioner's application for a waiver of deportation under former INA section 212(c), 8 U.S.C. § 1182(c), finding that González–Mesías was ineligible.

The IJ relied on two BIA decisions, *In re Brieva–*

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[1] The Notice To Appear also included a third charge, that González-Mesías was deportable as an alien convicted of a crime of domestic violence, under 8 U.S.C. § 1227(a)(2)(E)(i), but this charge was later withdrawn.

Perez, 23 I. & N. Dec. 766 (B.I.A.2005), and *In re Blake,* 23 I. & N. Dec. 722 (B.I.A.2005), which limit waivers of deportation under section 212(c) to only those grounds of deportability for which there is a comparable ground of inadmissibility under 8 U.S.C. § 1182(a)(2). The IJ held that González–Mesías was barred from relief because his two grounds of deportability, sexual abuse of a minor and a crime of violence, had no comparable grounds of inadmissibility. González–Mesías appealed to the BIA. He asked the BIA to reconsider its rulings in *Brieva* and *Blake* in light of the Second Circuit's decision in *Blake v. Carbone, 489* F.3d 88, which disagreed with the "comparable grounds" test set out in *Brieva* and *Blake.* The BIA adopted and affirmed the IJ's decision and rejected the appeal. It declined to overrule its decisions in *Brieva* and *Blake,* and while it recognized the Second Circuit's decision to the contrary, the BIA noted that it "decline[d] to follow the Second Circuit's holding in cases arising outside of that Circuit." This timely petition followed.

II.

Our jurisdiction is limited by the provisions of the REAL ID Act of 2005, Pub. L. No. 109–13, 119 Stat. 231 (2005). Under it, we may review only constitutional claims or questions of law raised by criminal aliens under removal orders. 8 U.S.C. § 1252(a)(2)(C)-(D).

Our review of constitutional issues is de novo; our review of issues of law gives deference to the BIA's interpretation of the immigration statutes it is charged with enforcing. INS v. Aguirre–Aguirre,

526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999).

González–Mesías's main argument is that we should adopt the Second Circuit's rationale in Blake v. Carbone and overrule the "comparable grounds" test. He recognizes, however, that this would require us to overrule two prior First Circuit cases, Dalombo Fontes, 483 F.3d 115, and Kim, 468 F.3d 58. The arguments that González–Mesías makes were squarely presented in both Dalombo Fontes and Kim. Those cases affirmed the BIA's rule in *Brieva* and rejected the arguments that the Second Circuit adopted in *Blake v. Carbone* and that González–Mesías repeats here. *See Dalombo Fontes,* 483 F.3d at 122–23; *Kim,* 468 F.3d at 61–63. Our upholding of the BIA's comparable grounds test is consistent with rules adopted by the Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits. *See Caroleo v. Gonzales,* 476 F.3d 158 (3d Cir. 2007); *Vo v. Gonzales,* 482 F.3d 363 (5th Cir.2007); *Valere v. Gonzales,* 473 F.3d 757 (7th Cir.2007); *Abebe v. Gonzales,* 493 F.3d 1092 (9th Cir.2007); *Falaniko v. Mukasey,* No. 07–9516, —— Fed.Appx. ——, 2008 WL 1696968 (10th Cir. Apr.9, 2008) (unpublished opinion); *Rubio v. U.S. Attorney Gen.,* 182 Fed.Appx. 925 (11th Cir. 2006). Only the Second Circuit's decision in *Blake v. Carbone* is at odds.

Regardless of the merits of González–Mesías's arguments (and we do not find them convincing), we are bound by the law of the circuit doctrine. That doctrine "holds a prior panel decision inviolate absent either the occurrence of a controlling

intervening event (e.g., a Supreme Court opinion on the point; a ruling of the circuit, sitting en banc; or a statutory overruling) or, in extremely rare circumstances, where non-controlling but persuasive case law suggests such a course." *United States v. Chhien,* 266 F.3d 1, 11 (1st Cir.2001).

González–Mesías argues that our decisions in Dalombo Fontes and Kim are contrary to the Supreme Court's decision in INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). First, St. Cyr precedes our decisions in Dalombo Fontes and Kim, and therefore is not a controlling intervening event which would allow this panel to overrule the two cases in the absence of an en banc sitting of this court. Second, in both those cases, we specifically analyzed St. Cyr and held that the comparable grounds test was consistent with the Court's reasoning in St. Cyr. See Dalombo Fontes, 483 F.3d at 122–23; Kim, 468 F.3d at 61–63.

To the extent González–Mesías is making independent constitutional arguments, they are without merit. The BIA's decisions in Blake and Brieva are not inconsistent with prior precedent and they have not been applied in an arbitrary and capricious manner to González–Mesías. And because he was treated the same as similarly situated aliens, there is no equal protection violation. See Dalombo Fontes, 483 F.3d at 123; Kim, 468 F.3d at 62.

The petition is denied.

BOARD OF IMMIGRATION APPEALS

IN RE: ROBINSON WLADIMIR GONZÁLEZ-MESÍAS, *Respondent.*	Aug. 2, 2002 File No. A22 230 921- San Juan, PR **ORDER**

Petitioned for Review from the Executive Office for Immigration Review Immigration Court
File: A22 230 921- San Juan, PR

Decided and Filed: August 2, 2002

COUNSEL

Patrick D. O'Neill, Esq., for Petitioner.

Crimilda Guilloty, Assistant Chief Counsel, for Department of Homeland Security.

OPINION

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting

that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). We are not persuaded by the respondent's arguments on appeal relating to the propriety of our decisions in *Matter of Blake,* 23 I&N Dec. 722 (BIA 2005), and *Matter of Brieva,* 23 I&N Dec. 766 (BIA 2005), and their application to the respondent's proceedings. It is well established that section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996), is limited to charges of deportability for which there is a comparable ground of inadmissibility. Our decisions in *Matter of Blake* and *Matter of Brieva* were not based upon any change in the law; rather, they are simply an extension of our long line of cases holding that section 212(c) relief is only available where there is a corresponding ground of inadmissibility. We recognize that the United States Court of Appeals for the Second Circuit disagrees with the Board's analysis in *Matter of Blake,* but we decline to follow the Second Circuit's holding in cases arising outside of that Circuit. *See Blake v. Carbone,* 489 F.3d 88 (2d Cir. 2007). Accordingly, the appeal is dismissed.

s/ [illegible]
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW IMMIGRATION COURT

ROBINSON WLADIMIR GONZÁLEZ-MESÍAS, *Plaintiff-Appellant,*	Sept. 8, 2005 File A 22 230 921 **ORDER**

Decided: September 8, 2008

Before IRMA LOPEZ-DEFILLO,
Immigration Judge.

COUNSEL

Jose Silva Cuerta, Esq., for Respondent.

Crimilda Guilloty, Esq., for the Government.

ORAL DECISION ISSUED BY THE COURT

IRMA LOPEZ-DEFILLO, Immigration Judge.

This case comes before the Court pursuant to a Notice to Appear that has been marked as Exhibit 1. On the same, the Government claims that the respondent is deportable inasmuch as he's not a citizen of the United States, he's a native and citizen of Chile. He became a permanent resident in 1979.

In 1985, the respondent was convicted in the Circuit Court of Fairfax Country, Virginia for the offense of sodomy committed on or about November 15, 1984 in violation of the Code of Virginia, Section 18.2–67.1. On June 14, 1985 the respondent was also convicted in the Circuit Court of Fairfax, Virginia for the offense of aggravated sexual battery committed on or about November 15, 1984 in violation of the Code of Virginia, Section 18.2–67.3. A sentence of a term of imprisonment of 10 years was imposed, even though sentence was suspended.

The respondent is deemed deportable pursuant to two modalities of Section 237(a) (2) (A) (iii). This is that the respondent is an aggravated felon as defined in Section 101(a) (43) (A) of the Act, law relating to sexual abuse of a minor, and 237(a) (2) (A) (iii) because of 101(a) (43) (F), in that the respondent has been convicted of a crime of violence for which the term of imprisonment ordered is at least one year.

The respondent, represented by counsel, admitted that all the allegations were correct. He also admitted that he was deportable pursuant to Section 237(a) (2) (A) (iii) because of 101(a) (43) (A). This is a law relating to sexual abuse of a minor. He denied that he was deportable because of a

conviction for an aggravated felony. The Court made a determination that even though the respondent was denying that in fact he had not committed a crime of violence, the respondent's conviction in fact constituted violence as defined in Title 18 United States Code Section 16 inasmuch as the respondent was convicted for sodomy against a minor and the indictment, which has been included in part of Exhibit 2, clearly states that he engaged in cunnilingus with Linda Mejia against her will by force, threat, and intimidation.

In addition to that, the respondent stands convicted of unlawfully and feloniously sexually abusing Linda Mejia, a female age 13, by intentionally touching her intimate parts or clothing covering her such intimate parts. These two actions on behalf of the respondent against a 13-year-old child definitely fall under the definition of crime of violence as annunciated in Title 18. United States Code Section 16, which states in pertinent part, Crime of violence, defined. Crime of violence means an offense that has as an element the use of force, attempted use, or threatened use of physical force against the person or property of another. Therefore, the respondent's action falls squarely into this definition.

The Court finds that this respondent is deportable pursuant to both Section 101(a) (43) (A) and Section 101(a) (42) (F) of the Act. Having made this determination, the Court finds that the respondent is deportable. Deportability has been established by evidence that is clear and convincing,

and this decision is based on unequivocal and substantial evidence.

Now, as a relief from removal, the respondent is asking for 212(c). The 212(c) form plus all supporting documents have been received and are part of this record. The Government has moved to pretermit all relief under Section 212(c); and the respondent claims that he should be allowed to go ahead with 212(c) relief.

The Government's contention is that under *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), the Board of Immigration Appeals has specifically held that "an alien who is removable on the basis of his conviction for sexual abuse of a minor is ineligible for a waiver under former Section 212(c) of the Immigration and Nationality Act", 8 U.S.C. 1182(c) (1994), because the aggravated felony ground of removal with which he was charged has no statutory counterpart in the grounds of inadmissibility of Section 212(a) of the Act. 8 U.S.C. at 1182(a) (2000); *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991), distinguished.

In this particular case, the respondent's conviction goes back to 1985 and as such, he was asking to be allowed to ask for relief under Section 212(c), which was repealed by IIRAIRA and partially repealed by AEDPA. Nevertheless, in this particular case, the respondent is barred from receiving relief under Section 212(c) because the Board of Immigration Appeals has specifically stated that a crime of sexual abuse of a minor for which he stands convicted places him in a position that he

would be ineligible for relief under Section 212(c) inasmuch as there's no comparable ground between his deportation ground and an inadmissibility ground.

In addition, *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005), the Board of Immigration Appeals has said that an alien who is removable on the basis of his conviction for a criminal violence is ineligible for a waiver under former Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), because the aggravated felony ground of removal for which he was charged has no statutory counterpart in the grounds of inadmissibility under Section 212(a) of the Act. 8 U.S.C. 1182(a) (2000).

In this particular case, the respondent was convicted of sodomy and sexual abuse of a minor. The Court has made a determination that both crimes involve violence, and as such, the Court made a finding that he was also deportable because he was an aggravated felon because he had committed a crime of violence to which he was sentenced for 10 years. Therefore, under *Matter of Brieva* this respondent is definitely barred from filing relief under former Section 212(c) inasmuch as there's no comparable ground for a crime of violence under Section 212(c).

Having made that determination that by case law this respondent is ineligible to file for relief under Section 212(c), this Court has to pretermit respondent's application for 212(c).

Having the respondent made no other relief or claim for removal, the following order shall be entered.

ORDER

IT IS HEREBY ORDERED that the respondent be removed from the United States to Chile on the grounds and on the charges contained in the Notice to Appear.

s/Irma Lopez-Defillo
IRMA LOPEZ-DEFILLO

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Before its repeal in 1996, Section 1182(c) of Title 8 of the United States Code (repealed 1996) provided as follows:

> **Nonapplicability of subsection (a).—** Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

Section 1182(a) in relevant part of Title 8 of the United States Code provides:

Inadmissible aliens.—

(a) Classes of aliens ineligible for visas or admission.— Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

***

(2) Criminal and related grounds

(A) Conviction of certain crimes **(B)** to afford adequate deterrence to criminal conduct;

(i) In general.— Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

> **(ii)** Exception.— Clause (i)(I) shall not apply to an alien who committed only one crime if—
>
> > **(I)** the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of the application for the admission to the United States, or
> >
> > **(I)** the maximum penalty possible for the crime of which the alien was convicted (of which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentence to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

Section 1227(a) in relevant part of Title 8 of the United States Code provides:

> **(a) Deportable aliens.**— Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if

the alien is within one or more of the following classes of deportable aliens:

***

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude.— Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions.— Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony.— Any alien who is convicted of an aggravated felony at any time after admission is deportable.

> **(iv)** High speed flight.— Any alien who is convicted of a violation of section 758 of Title 18, (relating to high speed flight from an immigration checkpoint) is deportable.
>
> **(v)** Failure to register as a sex offender.— Any alien who is convicted under section 2250 of Title 18, is deportable.
>
> **(vi)** Waiver authorized.— Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

Section 1212.3(f)(5) of Title 8 of the Code of Federal Regulations provides:

> **(f) Limitations on discretion to grant an application under section 212(c) of the [Immigration and Naturalization] Act.**— An application for relief under former section 212(c) of the Act shall be denied if:
>
> ***
>
> **(5)** The alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.

No. 08-605

In the Supreme Court of the United States

ROBINSON WLADIMIR GONZALEZ-MESIAS,
PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the denial of relief from removal under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), violates the equal protection component of the Due Process Clause, where an alien who is removable because he committed specific aggravated felonies is not being treated differently from other aliens who are similarly removable on grounds that have no statutory counterpart in the INA's grounds for inadmissibility.

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In the Supreme Court of the United States

No. 08-605

ROBINSON WLADIMIR GONZALEZ-MESIAS,
PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-6) is reported at 529 F.3d 62. The orders of the Board of Immigration Appeals (Pet. App. 7-8) and the immigration judge (Pet. App. 9-14) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 2008. On September 3, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including October 31, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. By its terms, Section 212(c) applied only to certain aliens in exclusion proceedings (*i.e.*, proceedings in which aliens were seeking to "be admitted" to the United States after "temporarily proceed[ing] abroad voluntarily"). In 1976, however, the Second Circuit determined that making that discretionary relief available to aliens who had departed the United States while denying it to aliens who remained in the United States violated equal protection. *Francis* v. *INS*, 532 F.2d 268, 273. The Board of Immigration Appeals (Board) adopted that rationale on a nationwide basis in *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976), so that Section 212(c) was generally construed as being available in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In applying the principle of treating those in deportation proceedings like those in exclusion proceedings, the Board has long maintained that an alien in deportation proceedings can obtain Section 212(c) relief only if the ground for his deportation has a comparable ground among the statutory grounds of exclusion. See, *e.g.*, *In re Wadud*, 19 I. & N. Dec. 182 (B.I.A. 1984); *In re Granados*, 16 I. & N. Dec. 726 (B.I.A. 1979). That practice is known as the "comparable ground" or "statutory counterpart" test, and it has been codified by regulation at 8 C.F.R. 1212.3(f)(5).

In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress amended Section

212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including aggravated felonies. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety. IIRIRA also did away with "deportation" and "exclusion" proceedings, substituting "removal."

In *INS* v. *St. Cyr*, *supra*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony on the basis of a plea agreement that the alien made at a time when the alien would still have been eligible for Section 212(c) relief in spite of the resulting conviction. 533 U.S. at 314-326. Although some aliens necessarily benefitted from the conclusion that Section 212(c)'s repeal was not retroactively applicable, the Court did not suggest that they would not still be subject to any *pre-existing* limitations on their eligibility for relief under Section 212(c), including the "statutory counterpart" test.

As relevant to the circumstances of this case, the operation of that test was further clarified by the Board in *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005), and *In re Brieva-Perez*, 23 I. & N. Dec. 766 (B.I.A. 2005). Those cases held that a ground of exclusion is only a "comparable ground" to the charged ground of deportation if they both use similar language to describe "substantially equivalent categories of offenses." *Id.* at 771; *In re Blake*, 23 I. & N. Dec. at 728. In *In re Blake*, the Board held that the "crime involving moral turpitude" ground of inadmissibility was not comparable to the ground of removal for having an aggravated felony con-

viction for sexual abuse of a minor (one of the two charges present in the instant case). *Id.* at 729. In *In re Brieva-Perez*, the Board similarly held that the "crime involving moral turpitude" ground of inadmissibility was not comparable to the ground of removal of having an aggravated felony conviction for a crime of violence (the other charge present in the instant case). 23 I. & N. Dec. at 773. Well before the Board published those precedent decisions, however, the analytical underpinnings of its interpretation were confirmed by, among others, the Ninth Circuit's decision in *Komarenko* v. *INS*, 35 F.3d 432 (1994).

In 2007, the Second Circuit disagreed with *Komarenko* and the "several other circuits" that had followed it. *Blake* v. *Carbone*, 489 F.3d 88, 103-104. Although the Second Circuit recognized that the statutory-counterpart test codified in 8 C.F.R. 1212.3(f)(5) did "nothing more than crystallize the agency's preexisting body of law and therefore [could not] have an impermissible retroactive effect," it held that, when analyzed on the basis of a "particular criminal offense[]," the ground of inadmissibility for a "crime involving moral turpitude" was sufficiently comparable to an aggravated felony of sexual abuse of a minor to permit retroactive relief under former Section 212(c). *Blake*, 489 F.3d at 98-99, 103.

2. Petitioner is a native and citizen of Chile. Pet. App. 2. He was admitted to the United States as a visitor and became a lawful permanent resident in 1979. *Ibid.* In 1985, after pleading guilty and no-contest, petitioner was convicted of one count of aggravated sexual battery (in violation of Va. Code § 18.2-67.3), and one count of sodomy (in violation of Va. Code § 18.2-67.1). Pet. App. 2-3. Those convictions were for engaging in cunnilingus with a 13-year-old girl "against her will by

force, threat and intimidation." *Id.* at 11. Petitioner was sentenced to concurrent ten-year terms of imprisonment on each charge, but the court suspended nine years and 335 days of each sentence. *Id.* at 3.

In 2005, petitioner was placed in removal proceedings on charges of being deportable under Section 237(a)(2)(A)(iii) of the INA, 8 U.S.C. 1227(a)(2)(A)(iii), on account of having been convicted of an aggravated felony as defined in 8 U.S.C. 1101(a)(43)(A) ("sexual abuse of a minor") and of having been convicted of an aggravated felony as defined in 8 U.S.C. 1101(a)(43)(F) ("crime of violence"). Pet. App. 3. An immigration judge found him removable on both of those charged grounds. *Id.* at 10-11.[1] The immigration judge ordered petitioner removed and pretermitted his application for Section 212(c) relief, holding that he was ineligible for that relief because his two grounds of deportability did not have any statutory counterpart in the grounds of inadmissibility contained in Section 212(a) of the INA, 8 U.S.C. 1182(a). Pet. App. 12-13 (citing the Board's decisions in *In re Blake* and *In re Brieva-Perez*).

On August 2, 2007, the Board dismissed petitioner's appeal from the immigration judge's decision. Pet. App. 8. The Board reiterated its conclusion that discretionary relief under Section 212(c) is available only where a ground of deportability has "a comparable ground of inadmissibility." *Ibid.* The Board explained that its decisions in *In re Blake* and *In re Brieva-Perez* had not represented any change in the law but rather were an

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[1] In the administrative record, the decisions of the Board and of the immigration judge both listed the charges against petitioner between the caption and the beginning of the decision. Those portions of the decisions are not included in the versions of the documents reprinted in the petition appendix. See Pet. App. 7, 9.

extension of a "long line of [prior] cases," and it declined to follow the Second Circuit's decision in *Blake* v. *Carbone*, *supra*, outside of the Second Circuit. *Ibid.* Petitioner sought review of the Board's decision in the court of appeals. *Id.* at 2.

3. The court of appeals denied petitioner's petition for review. Pet. App. 1-6. It observed that, in the absence of an intervening event, it was bound by its precedent in *Dalombo Fontes* v. *Gonzales*, 483 F.3d 115 (1st Cir. 2007), and *Kim* v. *Gonzales*, 468 F.3d 58 (1st Cir. 2006). Pet. App. 5. In those two cases, the court rejected the same arguments presented here, including the argument that the Board's interpretation is inconsistent with this Court's reasoning in *St. Cyr*. *Id.* at 6. The court noted that no other court of appeals has agreed with the Second Circuit's decision in *Blake*, whereas the Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits have each upheld the Board's statutory-counterpart test. Pet. App. 5 (citing *Caroleo* v. *Gonzales*, 476 F.3d 158 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363 (5th Cir. 2007); *Valere* v. *Gonzales*, 473 F.3d 757 (7th Cir. 2007); *Abebe* v. *Gonzales*, 493 F.3d 1092 (9th Cir. 2007), vacated, 514 F.3d 909 (9th Cir. 2008);[2] *Falaniko* v. *Mukasey*, 272 Fed. Appx. 742 (10th Cir. 2008); *Rubio* v. *United States Att'y Gen.*, 182 Fed. Appx. 925 (11th Cir. 2006)).

The court of appeals added that, even apart from its prior case law, it did not find petitioner's arguments "convincing," Pet. App. 5, and that, "[t]o the extent [petitioner] is making independent constitutional argu-

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[2] As discussed below (see pp. 8-9, *infra*), after the court of appeals' decision (and the petition for a writ of certiorari) in this case, the Ninth Circuit issued an en banc decision in *Abebe*, and a petition for further rehearing of that decision remains pending before the Ninth Circuit.

ments, they are without merit," *id.* at 6. The court observed that the Board's decisions in *In re Blake* and *In re Brieva-Perez* were "not inconsistent with" prior Board precedent and had not been applied arbitrarily or capriciously to petitioner. *Ibid.* It also held that there was no equal protection violation here because petitioner "was treated the same as similarly situated aliens." *Ibid.* (citing *Dalombo Fontes*, 483 F.3d at 123, and *Kim*, 468 F.3d at 62).

ARGUMENT

Petitioner describes (Pet. 16-26) a split in the courts of appeals about an issue that he claims (Pet. 26-32) is of substantial importance because it results in differential treatment among aliens in immigration proceedings. He implicitly agrees (Pet. 16-18) with the Second Circuit's conclusion in *Blake* v. *Carbone*, 489 F.3d 88, 103-104 (2007), that it violates an alien's equal protection rights to look to the charged grounds for his deportation, rather than the circumstances of the underlying offenses, when determining whether the grounds of removal are sufficiently comparable to a ground of inadmissibility.[3] The court of appeals reached the correct result. The issue concerns a statutory section repealed more than 12 years ago, and every court of appeals to have addressed the question (except the Second Circuit) would deny petitioner relief. No further review is warranted.

1. As petitioner acknowledges (Pet. 21-24), the First, Third, Fifth, Seventh, and Eighth Circuits have concluded in published opinions that the Board's appli-

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[3] A similar question is presented by the petition for a writ of certiorari in *Birkett* v. *Holder*, No. 08-6816, petition for cert. pending (filed Apr. 1, 2008).

cation of the statutory-counterpart test does not violate equal protection. See, *e.g.*, *Kim* v. *Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Caroleo* v. *Gonzales*, 476 F.3d 158, 162-163 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363, 371-372 (5th Cir. 2007); *Zamora-Mallari* v. *Mukasy*, 514 F.3d 679, 691-692 (7th Cir. 2008); *Vue* v. *Gonzales*, 496 F.3d 858, 860-862 (8th Cir. 2007).[4] After the petition for a writ of certiorari was filed, the Sixth Circuit added itself to that list by clearly upholding the constitutionality of the Board's statutory-counterpart test. See *Koussan* v. *Holder*, No. 07-4107, 2009 WL 330999, at *8-*10 (Feb. 12, 2009).

Petitioner also discusses (Pet. 18-21) the Ninth Circuit's decision in *Abebe* v. *Gonzales*, 493 F.3d 1092 (2007), vacated, 514 F.3d 909 (2008), which held that the statutory-counterpart test did not violate equal protection, but which was then vacated when the case was reheard by the court en banc. After the petition for a writ of certiorari in the instant case was filed, the en banc Ninth Circuit in *Abebe* issued its decision, holding that neither the Constitution nor this Court's decision in *St. Cyr* requires the government to make aliens in deportation proceedings eligible for the same form of discretionary relief under former Section 212(c) that is available to aliens in exclusion proceedings. *Abebe* v.

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[4] See *Falaniko* v. *Mukasey*, 272 Fed. Appx. 742, 746-749 (10th Cir. 2008) (unpublished decision "agree[ing] with the First, Third, Fifth, Seventh, Eighth, and Ninth Circuits that the statutorily prescribed basis of removal should be compared to the statutory grounds of inadmissibility for purposes of statutory counterpart analysis"); *Rubio* v. *United States Att'y Gen.*, 182 Fed. Appx. 925, 929 (11th Cir. 2006) (unpublished decision holding that the Board's application of the statutory-counterpart test is a "a reasonable interpretation of the relevant INA provisions" and does not conflict with *St. Cyr*).

Mukasey, 554 F.3d 1203, 1205-1207 (2009). The court thus rejected the antecedent principle driving petitioner's argument and the Second Circuit's decision in *Blake*.

The Ninth Circuit also stated, however, that its decision did not "cast[] any doubt on the regulation" that codifies the Board's statutory-counterpart test, while observing that its decision "might cause the government to reconsider the regulation, and eventually repeal it as no longer necessary." *Abebe*, 554 F.3d at 1207. A concurring opinion on behalf of three judges would have reaffirmed the Ninth Circuit's earlier decision in *Komarenko*, see *id.* at 1208-1213 (Clifton, J., concurring)—an approach under which petitioner in this case would also lose. Only Judge Thomas's dissenting opinion (joined by Judge Pregerson) would have followed petitioner's invitation to side with the Second Circuit's decision in *Blake*. *Id.* at 1217-1218. A petition for rehearing of the en banc decision in *Abebe* remains pending before the Ninth Circuit. At the court's request, the government filed a response to the rehearing petition (opposing further rehearing) on February 25, 2009.

Regardless of whatever else the Ninth Circuit does in *Abebe*, its recent en banc decision, by introducing an additional rationale (not advanced by the government), which could affect any further consideration that other courts of appeals give to the constitutional question or the Board's future applications of the statutory-counterpart test, has already refuted petitioner's claim (Pet. 26) that the issue on which he seeks this Court's review "has fully percolated." Other factors also make further review inappropriate at this time. The split within the circuits is heavily lopsided. And petitioner's question concerns an alien's eligibility for a form of discretionary

relief under a statute that was repealed more than 12 years ago and is only potentially applicable to him on the theory that he might have relied on being eligible for it had his removal proceedings been initiated before the 1996 enactments. See *INS* v. *St. Cyr*, 533 U.S. 289, 325 (2001). But the statutory-counterpart test to which petitioner objects is not new, see *Blake*, 489 F.3d at 98-99—indeed, it long predates the repeal of Section 212(c) in 1996, see p. 2, *supra*—and petitioner could easily have avoided its effects by departing the country voluntarily at any point before his removal proceedings were initiated in 2005.

In contending that this case presents an issue of exceptional importance, petitioner cites (Pet. 27) statistics estimating the number of non-citizens ordered deported "based on crimes categorized as 'aggravated felonies'" over a 15-year period. He also cites (Pet. 27 n.6) data pertaining to the number of lawful permanent residents "deported for criminal convictions" over a 10-year period. The number of aliens that could be affected by the outcome of this case, however, is necessarily a great deal smaller, because an alien would not become eligible for discretionary relief unless he or she met each of the following criteria: (1) lawful-permanent-resident status; (2) a conviction predating the repeal of Section 212(c); (3) a plea of guilty or no contest; (4) a removal charge flowing from an aggravated-felony conviction; and (5) a removal charge that has no comparable ground of inadmissibility.

2. Even under the view that aliens in removal proceedings are not barred outright from discretionary relief under former Section 212(c), the court of appeals reached the correct result in the instant case.

Petitioner essentially argues as follows: If he had left the United States and attempted to return, his aggravated sexual battery conviction would have subjected him to removal based on a charge of inadmissibility for having committed "a crime involving moral turpitude" under Section 212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(I), which would have rendered him eligible for Section 212(c) relief. Because he is within the United States and subject to removal based on charges of having committed aggravated felonies of sexual abuse of a minor and a crime of violence—both grounds that the Board holds are not comparable to the inadmissibility ground of having committed a crime involving moral turpitude—he is ineligible for Section 212(c) relief. Therefore, he asserts, his equal protection rights have been violated. That argument fails.

As this Court has repeatedly stated: "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). Thus, whether an immigration provision is constitutional depends only on the existence of a "facially legitimate and bona fide reason" for its enactment. *Id.* at 794.

As a general matter, Congress has determined that the statutory regime that applies to an alien who has already been admitted to the country is different from the one that applies to an alien who is seeking admission. Compare 8 U.S.C. 1182, with 8 U.S.C. 1227. It is thus unsurprising that the categories of offenses that make an alien inadmissible are not always the same as those that may render an alien deportable from the country. That fundamental legislative choice shows that aliens

who are inadmissible are not similarly situated with aliens subject to removal on grounds of being deportable, even though there is some overlap between the conduct that renders an alien inadmissible and the conduct that renders an alien deportable. It is only where a ground that renders an alien deportable under the one regime has a statutory counterpart that renders an alien inadmissible under the other regime that the two aliens could be said to be similarly situated for equal protection purposes.

The reasoning employed in *Komarenko* v. *INS*, 35 F.3d 432 (9th Cir. 1994), which has since been endorsed by most of the other courts of appeals, is persuasive. In *Komarenko*, the court rejected a similar equal protection claim in finding that two groups of aliens convicted of different crimes were not similarly situated for purposes of eligibility for Section 212(c) relief. *Id.* at 435. The court concluded that the "linchpin of the equal protection analysis in this context is that the two provisions be 'substantially identical.'" *Ibid.*; see *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 952 (7th Cir. 1993). Komarenko claimed the court was required to "focus on the facts of his individual case and conclude that because he *could have been* excluded under the moral turpitude provision, he has been denied equal protection." *Komarenko*, 35 F.3d at 435. The court, however, refused "to speculate whether the I.N.S. would have applied this broad excludability provision to an alien in Komarenko's position," because engaging in such speculation "would extend discretionary review to every ground for deportation that could constitute 'the essential elements of a crime involving moral turpitude.'" *Ibid.* Such an approach would be tantamount to "judicial legislating," would "vastly overstep" the courts' "'limited scope of

judicial inquiry into immigration legislation,'" and "would interfere with the broad enforcement powers Congress has delegated to the Attorney General." *Ibid.* (quoting *Fiallo*, 430 U.S. at 792). Accordingly, the court "decline[d] to adopt a factual approach to * * * equal protection analysis in the context of the deportation and excludability provisions of the INA," and it "conclude[d] that Komarenko was not denied his constitutional right to equal protection of the law."[5] *Ibid.*

Thus, it is only when the ground for a deportable alien's removal from the country has a statutory counterpart in the grounds for inadmissibility that a deportable alien is arguably similarly situated to inadmissible aliens. See *Komarenko*, 35 F.3d at 435. The Seventh Circuit explained this point in *Leal-Rodriguez*, *supra*:

> [C]ertain deportable aliens may receive exclusion-type relief as if they were subject to exclusion rather than deportation. But that fiction requires that the aliens be excludable for the same reasons that render them deportable—a situation not necessarily true for all aliens facing deportations. Accordingly, section 212(c) relief was not extended to aliens whose deportability was based on a ground for which a comparable ground of exclusion did not exist.

990 F.2d at 949. The court then proceeded to find that an alien deportable for entering the United States without inspection was not eligible for Section 212(c) relief because there was no corresponding ground of inadmissibility to the deportation charge. *Id.* at 950.

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[5] The same rationale applies equally to 8 C.F.R. 1212.3(f)(5), which later codified the agency's longstanding practice of applying the statutory-counterpart test.

Similarly, in this case, petitioner's argument fails because his grounds of deportation for being convicted of the aggravated felonies of sexual abuse of a minor and a crime of violence are not "substantially equivalent" or "substantially identical" to a ground of inadmissibility under Section 212(a) of the INA. *Komarenko*, 35 F.3d at 435. As the Board correctly reasoned in *In re Blake* and *In re Brieva-Perez*, respectively, neither sexual abuse of a minor under 8 U.S.C. 1101(a)(43)(A) nor a crime of violence under 8 U.S.C. 1101(a)(43)(F) has a statutory counterpart in Section 212(a)'s grounds of inadmissibility. Although sexual abuse of a minor or a crime of violence *may* constitute "a crime involving moral turpitude" under Section 212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(I), the latter addresses a distinctly different and much broader category of offenses than a charge for an aggravated felony of sexual abuse of a minor or for an aggravated felony of a crime of violence. Thus, while the statutory-counterpart test does not require a perfect match, the ground of inadmissibility must address essentially the same category of offense on which the removal charge is based. Under the pertinent regulations and the Board's decisions, that test is not met merely by showing that some or many of the offenses included in the charged category could also be crimes involving moral turpitude. See, *e.g.*, *Zamora-Mallari*, 514 F.3d at 693 (holding that the aggravated felony of sexual abuse of a minor has no statutory counterpart); *Avilez-Granados* v. *Gonzales*, 481 F.3d 869, 871-872 (5th Cir. 2007) (same).[6] That analysis is firmly

[6] By contrast, the Board found in *In re Meza*, 20 I. & N. Dec. 257 (B.I.A. 1991), that the deportability ground for a drug-trafficking-related aggravated felony did have a statutory counterpart at former Section 212(a)(23)(A) of the INA, which referred to convictions for

supported by the unanimous opinions of the courts of appeals holding that a firearms offense (which is a ground of removability under 8 U.S.C. 1227(a)(2)(C)), has no statutory counterpart under Section 212(a), even though "many firearms offenses may also be crimes of moral turpitude." *In re Blake*, 23 I. & N. Dec. 772, 728 (B.I.A. 2005).[7]

Thus, because petitioner is not similarly situated to inadmissible aliens who have been convicted of crimes involving moral turpitude, and because he is not being treated any differently from other aliens who are deportable upon grounds that themselves have no corresponding ground of inadmissibility, his equal protection claim fails.

"violation of, or conspiracy to violate, any law or regulation * * * relating to a controlled substance." 8 U.S.C. 1182(a)(23)(A) (1988). Both provisions addressed similar categories of offenses involving illicit trafficking in drugs.

[7] See, *e.g.*, *Adefemi* v. *Ashcroft*, 386 F.3d 1022, 1031 (11th Cir. 2004) (firearms offender ineligible for Section 212(c) relief); *Cato* v. *INS*, 84 F.3d 597, 599 (2d Cir. 1996) (same); *Gjonaj* v. *INS*, 47 F.3d 824 (6th Cir. 1995) (same); *Rodriguez* v. *INS*, 9 F.3d 408 (5th Cir. 1993) (same); *Campos* v. *INS*, 961 F.2d 309 (1st Cir. 1992) (same); *Cabasug* v. *INS*, 847 F.2d 1321 (9th Cir. 1988) (same).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

United States Supreme Court

ROBINSON WLADIMIR GONZÁLEZ-MESÍAS,
Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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INTRODUCTION

Respondent acknowledges the existence of an inter-circuit conflict concerning an issue this Court has previously recognized to be of great importance to many lawful permanent residents ("LPRs"): the availability of a discretionary waiver of deportation under former § 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1182(c) (1994) (repealed 1996). The circuit conflict urgently calls for this Court's intervention. Absent that intervention, the availability of a waiver will continue to turn on the circuit in which deportation proceedings are held.

While conceding that the circuits are split over the constitutionality of the "statutory counterpart" test for determining waiver eligibility in deportation cases, Respondent suggests that this constitutional issue is not of substantial importance and the petition is premature. Respondent additionally argues, on the merits, that the courts upholding the statutory counterpart test are correct. These arguments do not assist Respondent here. First, this Court's ruling in *INS v. St. Cyr*, 533 U.S. 289 (2001), and the facts set forth in the Petition (facts that Respondent does not dispute) amply establish the substantial importance of the question presented. Second, notwithstanding Respondent's contentions to the contrary, the en banc Ninth Circuit's recent decision in *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc), in no way suggests that the Petition is premature. To the contrary, that decision further entrenches the inter-circuit conflict and demonstrates its intractability. Third, in attempting

to defend the statutory counterpart test, Respondent offers no rational basis for treating Petitioner more harshly than other LPRs merely because he never left the country. The position taken by the Second Circuit, which has held that such differential treatment violates equal protection, is well reasoned and persuasive, and should be established as the law of the land by decision of this Court.

I. RESPONDENT CONCEDES THAT THE CIRCUITS ARE SPLIT OVER WHETHER THE STATUTORY COUNTERPART TEST FOR § 212(C) RELIEF VIOLATES EQUAL PROTECTION.

Respondent acknowledges that there is a split among the circuits in regard to the constitutionality of the statutory counterpart test for § 212(c) relief. Specifically, Respondent acknowledges that the Second Circuit has disagreed with the Ninth Circuit and others that have upheld the statutory counterpart test. Opp. 4.

Respondents do not suggest that the Second Circuit has any inclination to reverse its position in *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007), or that any other circuit is inclined to reverse itself and adopt the Second Circuit's view. The circuits have entrenched themselves into their diametrically opposed positions. The Second Circuit expressly recognized that it was disagreeing with "several other circuits" when it held in *Blake* that the statutory counterpart tests violates the constitutional guarantee of equal protection. *See* 489 F.3d at 103-04. (2d Cir. 2007). In no uncertain terms, the *Blake* court rejected the "formulaic"

approach of the other circuits, noting that it was "bound . . . to ensure that 'permanent residents who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.'" *Id.* at 104 (quoting *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976)). Other circuits have likewise recognized their split with the Second Circuit since its decision in *Blake*, but have declined to follow that decision. *See Koussan v. Holder*, No. 07-4107, 2009 WL 330999, at *5 (6th Cir. Feb. 12, 2009); *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 691-92 (7th Cir. 2008); *Vue v. Gonzalez*, 496 F.3d 858, 861 (8th Cir. 2007).

Thus, Petitioner asks this Court to resolve a widely recognized, settled, split of authority whose existence Respondent does not, and cannot, dispute.

II. THE NINTH CIRCUIT'S RECENT EN BANC DECISION IN *ABEBE* FURTHER ENTRENCHES THE CIRCUIT SPLIT.

As described in Respondent's Opposition (Opp. 8), since the filing of the petition for a writ of certiorari in this case, the Ninth Circuit has vacated its prior decision in *Abebe v. Mukasey*, 493 F.3d 1092 (2007) (which, as discussed at Pet. 19-21, declined to follow the Second Circuit in *Blake* and found the statutory counterpart test to be constitutional), reheard the case en banc, and issued a new decision. *See Abebe*, 554 F.3d 1203. The en banc court in *Abebe* held that there is no equal protection requirement to extend eligibility for § 212(c) relief to deportable aliens when Congress has only made such relief available to aliens facing exclusion (or "inadmissibility"). *Id.* at 1205-07. As a consequence of that holding, the

court further held that the BIA committed no equal protection violation by denying § 212(c) relief to the petitioner in that case. *Id.* at 1207. A petition for rehearing in *Abebe* is pending.

The en banc Ninth Circuit decision in *Abebe* parts company, in regard to its reasoning, with the decisions of the other circuits that have affirmed the constitutionality of the statutory counterpart test. In particular, while the decision accords with the Third, Fifth, Sixth, Seventh and Eighth Circuits' conclusions that the statutory counterpart test satisfies equal protection, it rejects the very premise for the existence of the statutory counterpart test—*i.e.*, that equal protection *requires* it. *Compare Abebe, supra*, with *Valere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007); *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007); *Voe v. Gonzales*, 482 F.3d 363 (5th Cir. 2007); *Dalombo Fontes v. Gonzales*, 483 F.3d 115 (1st Cir. 2007); *Soriano v. Gonzales*, 496 F.3d 909 (8th Cir. 2006); *Koussan*, 2009 WL 330999, at *5.

Respondent argues that the "additional rationale" introduced by the *Abebe* decision refutes Petitioner's claim that the question presented in this case has "fully percolated." Opp. 9. Respondent thus suggests that the question presented is premature. Not so. That the Ninth Circuit's decision in *Abebe* goes farther than other courts in rejecting a challenge to the statutory counterpart test—by denying that the test is ever constitutionally necessary—merely entrenches further the split at issue between the Second Circuit and its sister circuits.

As between the Second Circuit and Ninth Circuit, in particular, the split now appears even more intractable and unlikely ever to be resolved without this Court's intervention. The deep split between those circuits alone is of great significance, given that, as indicated by data set forth in the Petition, the Second and Ninth Circuits together receive a large majority (approximately 71%) of all petitions for review of BIA decisions. Pet. 30-31.

While the *Abebe* decision does create an additional split between the Ninth Circuit and those circuits that accept the underlying premise for the statutory counterpart test, that split is ancillary to the question presented in this case.

III. RESPONDENT'S EFFORT TO MINIMIZE THE IMPORTANCE OF THE QUESTION PRESENTED IS UNAVAILING.

In contesting Petitioner's argument concerning the importance of the question presented, Respondent takes issue with Petitioner's use of data on the large number of deportations for criminal offenses, and for aggravated felonies in particular. Opp. 10. Specifically, Respondent argues that the affected class is a "great deal smaller" than Petitioner's data suggest, because the Petition relates to a statute repealed 12 years ago and applicable today only to a limited class of LPRs who meet several criteria, including the following: (1) aggravated felony convictions; (2) convictions predating the repeal of § 212(c); (3) pleas of guilty or no contest; and (4) a deportation charge that has no "comparable" statutory ground of inadmissibility. Opp. 10. This is a hollow argument. Respondent

points to no actual data indicating that the class affected by the issue raised in the Petition is small. Furthermore, and more importantly, Respondent fails to come to grips with this Court's opinion in *St. Cyr* (discussed at Pet. 26-28), which recognizes the critical importance of § 212(c) relief, even after the repeal of that statute, to a large class of individuals with convictions for aggravated felonies, following guilty pleas, or plea bargains or their equivalent.

In *St. Cyr*, this Court recognized that the "extension of § 212(c) relief to the deportation context has had great practical importance" to an "extremely large" class. 533 U.S. at 295-96 (2001). The Court noted specifically that the 1996 expansion of the definition of "aggravated felony" rendered the number of individuals dependent on eligibility for § 212(c) relief even higher than the numbers suggested by relevant data the Court had found. *Id.* at 296 n.6. Against this backdrop, the Court held that the repeal of § 212(c) does not apply retroactively to aliens who entered guilty pleas prior to its repeal. *Id.* at 323-26.

Respondent's suggestion that the class affected by the issue raised in the Petition is insubstantial, and that the availability of § 212(c) relief to members of that class is not a matter of much importance, directly contradicts this Court's contrary conclusion in *St. Cyr*. Respondent is correct that the *St. Cyr* Court had no occasion to address the "statutory counterpart" test. The Court nonetheless did recognize that the availability of § 212(c) relief—including specifically its availability in cases involving aggravated felonies—is an issue of substantial importance. That important issue is

squarely presented by the Petition, because LPRs convicted of aggravated felonies will most often fail the statutory counterpart test (*see* Pet. 27-28), guaranteeing that the availability of § 212(c) relief for such individuals will be severely curtailed.

In an additional effort to minimize the importance of the issue presented by the Petition, Respondent asserts that the circuit split is "heavily lopsided." Opp. 9. Respondent neither disputes nor even addresses, however, the data presented in the Petition indicating that the Second Circuit receives a highly disproportionate number of appeals from BIA decisions—nearly 25% of the total. *See* Pet. at 30-31, & n.8. A hypothetical case in which a circuit that receives virtually no immigration cases disagrees with all of the other circuits on an issue of immigration law might present a split of little importance. That is not the case here. Here, a large percentage of LPRs find themselves eligible for § 212(c) relief on equal protection grounds, because they are in the Second Circuit, while numerous other LPRs in jurisdictions outside of the Second Circuit are subject to a different interpretation of equal protection requirements and are therefore denied relief. Respondent's myopic focus on the mere count of circuits on each side of the question presented obscures these salient circumstances warranting the Court's intervention.

IV. RESPONDENT FAILS TO IDENTIFY ANY RATIONAL BASIS FOR TREATING PETITIONER MORE HARSHLY THAN SIMILARLY SITUATED ALIENS MERELY BECAUSE HE NEVER LEFT THE COUNTRY.

Respondent attempts to skirt the pertinent question of whether it violates equal protection to treat a deportable LPR more harshly than an inadmissible LPR merely because the deportable LPR never left the country. Accordingly, Respondent does not attempt to identify any rational basis for this differential treatment. As articulated by Respondent, the question presented is simply whether denial of § 212(c) relief violates the constitutional guarantee of equal protection "where an alien who is removable because he committed specific aggravated felonies is not being treated differently from other aliens who are similarly removable on grounds that have no statutory counterpart in the INA's grounds for inadmissibility." Opp. I.

Notwithstanding Respondent's attempt to avoid the critical question, Respondent implicitly recognizes the linchpin issue presented by the Petition in proposing that "petitioner could easily have avoided [the statutory counterpart test's] effects by departing the country voluntarily at any point before his removal proceedings were initiated in 2005." Opp. 10. Respondent thus recognizes that petitioner's failure to have ever left the country—even had he just stepped across the border once and immediately returned—is all that stands between him and eligibility for a § 212(c) waiver.

In addressing the statutory counterpart test, the Second Circuit, in *Blake*, correctly discerned the issue before it as "whether the 'irrelevant and fortuitous' circumstance of not leaving the country stands in the way of petitioner's eligibility for a § 212(c) waiver." *Blake* 489 F.3d at 101 (citing *Francis*, 532 F.2d at 273). Having correctly discerned the issue, the court found, in a persuasive and well reasoned opinion, that the statutory counterpart test violates equal protection. *Id.* at 101-04. The *Blake* court explained that what makes one removable alien similarly situated to another is that he or she has committed an identical offense to that committed by another alien—not whether Congress used the same language to capture the offense for both excludable and deportable aliens. *See id.*

Focusing on whether the same language is used to capture identical offenses (as the statutory counterpart test does) results in treating certain LPRs more harshly than others merely because they have never left this country—a constitutionally repugnant result. Compounding this constitutional affront, the statutory counterpart test gives the government unfettered discretion to ensure, whenever desired, that an LPR cannot seek a § 212(c) waiver. The government need only select deportation grounds that do not have a precise statutory counterpart in the grounds for inadmissibility. Pet. 28-29. Respondent entirely ignores this compounding problem, just as Respondent ignores the principal problem of penalizing an LPR for settling, with constancy, in this country. Determining whether LPRs are

similarly situated on the basis of whether they have committed the same criminal offenses avoids these problems, and is the approach to equal protection that Petitioner would urge this Court to adopt if the Petition is granted. That approach would rightly ensure that individuals like Petitioner, who lived productively in this country with his U.S. citizen spouse for nearly 20 years after his *Alfred* plea, without any further criminal incident, will have the same opportunity to seek a deportation waiver as others similarly situated.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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